Supreme Court No. 96527-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother, and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company, and INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,

Respondents.

BRIEF OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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I. INTRODUCTION

This Court should only review the Court of Appeals' decision in *Vargas v. Inland Wash., LLC*, No. 76717-8-I, 2018 Wash. App. LEXIS 2123 (Ct. App. Sep. 17, 2018) which held that the standards for discretionary review set forth in Rule of Appellate Procedure 2.3(b)(4) were not met because of this Court's ruling in *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018)("*Afoa II*"). The Court should decline the Petitioner's and Labor and Industries' (L&I's) invitation to review issues that are neither properly before the Court on this appeal, ripe for adjudication, nor fully developed in the record. If the Court does review these undeveloped issues, it should reject the gross expansion of general contractor liability L&I proposes. L&I seeks to conflate the concepts of vicarious liability in tort with a non-delegable duty applicable in administrative safety violations.

If L&I's extreme view is to prevail then it would effectively implement a doctrine of strict liability for general contractors for safety violations of subcontractors even when (as here) L&I's own inspectors did not find the general contractor violated a rule. Such an extreme view is counter to authority not cited in L&I's amicus brief, undermines the hundred-year old statutory framework of Industrial Insurance in our state,

and if adopted by the Court, amicus believes the effect will be far-reaching.

II. IDENTITY AND INTEREST OF AMICUS CURIAE BUILDING INDUSTRYASSOCIATION OF WASHINGTON

The Building Industry Association of Washington ("BIAW") represents over 8,000 member companies that employ tens of thousands of Washingtonians. BIAW is made up of 14 affiliated local associations: the Building Industry Association of Clark County, the Central Washington Home Builders Association, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Home Builders Association of Kitsap County, the Lewis-Clark Building Contractors Association, the Lower Columbia Contractors Association, the North Central Home Builders Association, the North Peninsula Building Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Builders Association, the Skagit-Island Counties Builders Association, the Spokane Home Builders Association, the Home Builders Association of Tri-Cities and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry and the vast majority of BIAW builders construct between 1 and 5 houses per year. Many of BIAW's members serve as both

general contractors and subcontractors and are subject to the Washington Industrial Safety and Health Act and the Industrial Insurance Act under Title 51 as well as the regulatory scheme implemented by L&I for both chapters. Some of BIAW's members have been recently unjustly cited for safety violations of subcontractors. Thus, the circumstances in this case are familiar to BIAW members across Washington state and BIAW members have an interest in ensuring that the courts properly apply the law governing safety violation.

III. ISSUE OF INTEREST TO AMICUS CURIAE

Should this Court evaluate issues not included in the decision currently on appeal? If so, should this Court undermine its reasoning in *Afoa II* and promulgate a new doctrine of "per se" or strict liability for general contractors for safety violations of subcontractors?

IV. ARGUMENT

The matters raised in appellant's brief should not be resolved in an interlocutory appeal of a decision that only addressed the application of RAP 2.3(b)(4) to the case here. The Court should decline L&I's invitation to use this case as a vehicle to apply a new doctrine of strict liability to general contractors for the safety violations of subcontractors in light

existing authority and that such a doctrine would undermine the statutory program of Industrial Insurance in our state.

A. THE COURT SHOULD LIMIT ITS REVIEW TO THE DECISION CURRENTLY ON APPEAL, DECLINING PETITIONER'S INVITATION TO REVIEW ISSUES NOT PROPERLY BEFORE IT.

It is simply premature for the Court to act on Petitioner's suggestions on the substantive matters in this case. The limited issue under review by the Court is whether Division I erred in reversing its decision to grant discretionary review and in remanding the case to superior court. RAP 2.3(b)(4) provides one ground that a Court of Appeals may use to review a case:

> (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

As noted in the Respondent's brief, interlocutory appeals are disfavored. Respondent's Brief at pp. 8-9 *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 232 P.3d 591 (2010); *citing Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). In *Maybury* this Court held that piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business. Pretrial review of rulings confuses the functions of trial

and appellate courts. A trial court finds facts and applies rules and statutes to the issues that arise during a trial. An appellate court reviews those rulings for legal error and considers the harm of the alleged error in the context of its impact on the entire trial.

The Court of Appeals issued a succinct summary of its rationale for why review was improvidently granted:

> In light of the Supreme Court's decision in *Afoa v. Port of Seattle,* 191 Wn.2d 110, 421 P.3d 903 (2018) [*Afoa II*], which reversed this court's decision in *Afoa v. Port of Seattle,* 198 Wn. App. 206, 393 P.3d 802 (2017) [*Afoa I*], the standards for discretionary review set forth in RAP 2.3(b)(4) are not met. Accordingly, we deem review improvidently granted.

Vargas, et al., v. Inland Washington, LLC, Wash. State Court of Appeals No. 76717-8-I (Unpub. Op., September 17, 2018).

Under the plain language of the Rule, the Court of Appeals was within its right to decline to entertain a discretionary review of an appeal and to wait until the trial court has had a chance to resolve all pending claims against the other defendants and a full record is available on final appeal. That is the sole issue properly before this Court and on that limited matter this Court should resolve the appeal in favor of Respondent.

B. THE COURT SHOULD REJECT AN EXPANSIVE READING OF *STUTE* AND ITS PROGENY.

In the alternative, if the Court is inclined to examine whether a general contractor may be held vicariously liable for the safety violations of

subcontractors, then this Court should affirm its reasoning in *Afoa II* because it fits with the existing case law.

1. Current legal status of upper tier contractors

Employers have a statutory duty to provide a safe work place for employees. RCW 49.17.060. This duty applies to employers' own employees and to the employees of others on the same job site, but in slightly different ways. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). An employer has a general, affirmative duty to provide his or her own employees a workplace that has no hazards, even if there is no regulation addressing that particular hazard. In contrast, an employer's duty to other entities' employees only requires compliance with applicable regulations, not a general duty to keep the other employees safe. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978). Essentially, this means that when a regulation requires specific safety precautions, a general contractor has a duty to take those precautions or see that those precautions are taken, even if none of his or her own employees could be at risk.

WAC 296-155-100(1)(a) condenses the relevant statutory and case law into one articulation of the standard:

> (1) It shall be the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice:
> (a) A safe and healthful working environment.
> (b) An accident prevention program as required by these standards.

(c) Training programs to improve the skill and competency of all employees in the field of occupational safety and health.

An employer's duty under WAC 296-155-100(1)(a) is co-extensive with its control. General contractors are assumed to have control over a worksite, simply by merit of being general contractors. *Stute.* Because this control is assumed as a matter of law, a general contractor also has the related duty, as a matter of law.

But contrary to L&I's assertions, *Stute* and later case law did not establish that when a WISHA violation happens on a general contractor's worksite that it follows automatically that the general contractor has not fulfilled his or her duty. *Stute* did not hold that a general contractor is always liable for the subcontractor's WISHA violation. In fact, the Court in *Stute* acknowledged that contracting with a third party to fulfill certain safety requirements was a valid alternative to fulfilling the requirements personally. In *Stute,* the Court described the general contractor's duty as "responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities" *Stute v. P.B.M.C., Inc.,* 114 Wn.2d at 464. In other words, if a general contractor takes reasonable steps to ensure compliance with WISHA, such as contracting with a reliable subcontractor to provide safety equipment, she has discharged her duty to maintain a safe workplace.

This view matches post-*Stute* case law in which courts declined to apply a doctrine of strict liability for safety violations of subcontractors to generals. For example, this Court found in 2006 that the Division of Occupational Safety and Health (DOSH), as the accuser, must provide facts to support its assertion that a general contractor violated WISHA. *SuperValu, Inc. v. Dep't of Labor and Indus.,* 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).[1] Similarly, decisions out of the Board of Industrial Insurance Appeals (BIIA) clearly state that

> proof of a subcontractor's cited safety violation does not, in and of itself, constitute proof that a general contractor's primary safety obligation was not met. A determination as to whether a general contractor has established, supervised and enforced a safe working environment in a manner that is effective in practice involves an analysis similar to that used in evaluating "effective in practice" for the affirmative defense of unpreventable employee misconduct.

In re Exxel Pacific, BIIA Dec., 96 W182 (1998).

In another appeal from BIIA, DOSH argued that the fact that a subcontractor had committed a WISHA violation proved that the general contractor had violated WAC 296-155-100(1)(a). Division III questioned this assertion without deciding the issue:

> We question whether the authorities cited by DLI support this contention. We also posit that if WISHA or regulations thereunder intended to impose strict liability on a general contractor for all violations of a subcontractor, a statute or regulation would so read.

[1] If L&I's position is accurate that *Stute* stands for the proposition that general contractors are "per se liable" for all safety violations of subcontractors, then it begs the question of why this Court in *SuperValu* would require DOSH to allege other facts to prove a Stute did not establish a rule of "guilt by association" for general contractors (ie privity with a subcontractor was enough to prove a violation).

Lanzce G. Douglass, Inc. v. Dep't of Labor & Indus., No. 35399-1-III, 2018 Wash. App. LEXIS 2587 (Ct. App. Nov. 15, 2018). These cases, taken together, strike an appropriate balance between ensuring workplace safety and placing responsibility on those who are actually at fault, a goal this Court recently acknowledged in *Afoa II.*

2. Reasoning in *Afoa II* tracks the standard of a general contractor's non-delegable duty under *Stute*

Contrary to L&I's position, this Court's reasoning in *Afoa v. Port of Seattle*, 191 Wn. 2d 110, 421 P.3d 903 (2018) *(Afoa II*) adhered to the duty general contractors outlined under the *Stute* decision. In *Afoa II*, the Court stated that

> "A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work. . . If the duty exists, it is non-delegable[...]. If the general contractor- or by extension, jobsite owner- has the right to exercise control, it also has the duty within the scope of that control to provide a safe place of work."

Afoa II at 121.

This is an accurate statement of the law and tracks the Court's prior holding and dicta in *Stute*, described above, and later cases. It also serves to clarify the confusion in case law post-*Kamla*, described below, which L&I has relied on for its overly-broad interpretation of general contractor liability. This Court should reject L&I's invitation to "clarify" reasoning in *Afoa II* that accurately states the law.

3. Confusion from *Kamla v. Space Needle Corp.*, 147 Wn.2d 114 (2002).

Although *Stute* and *Afoa II* are consistent in their treatment of general contractor liability, other case law has been less clear in the application of this standard. But no case has held that a general contractor is liable without an individualized finding of fault. This confusion stems from Supreme Court dicta in *Kamla v. Space Needle Corp*., 147 Wn.2d 114, 52 P.3d 472 (2002) in which the Court said that "the *Stute* court imposed the per se liability as a matter of policy[.]" Within the context of the case, it appears the Court was invoking Black's Law Dictionary definition of "liability." Liability is "[t]he quality, state, or condition of being legally obligated or accountable." *Liability*, Black's Law Dictionary (10th ed. 2014).

A general contractor's obligation and accountability attach per se, as this Court stated in *Kamla*. The Court did not say that general contractors are per se liable as a matter of policy. "Liable" is "[b]ound or obliged in law or equity; responsible; chargeable; answerable; compellable to make a satisfaction, compensation restitution." *Liable*, Black's Law Dictionary (10th ed. 2014). In other words, *Kamla* stated that general contractors had a per se duty, not that they had per se breached that duty.

Also, *Kamla* involved an analysis of the liability of an owner- not a general contractor and the Court here sought to distinguish the more

limited liability of an owner from the broader (though not unlimited) responsibility of a general contractor.

Despite these distinctions, other courts (and L&I) have noted the language in *Kamla* and used it to apply a broader interpretation of liability for general contractors. *See, e.g.*, *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 893, 313 P.3d 1215, 1221 (2013) (Division III held that "[a] violation of WISHA by a subcontractor's employee is chargeable to both the subcontractor and general contractor); *Dep't of Labor and Indus. V. Howard S. Wright Constructors LP*, No. 73943-3-I, 2016 Wn. App. Lexis 1646 (2016) (Division I quoted the per se liability section of *Kamla*.); *Estate of Owens v. Nw. Assocs. LLC*, No. 21196-7-III, 2003 Wash. App. LEXIS 288 (Ct. App. Feb. 25, 2003).

Until L&I began misconstruing *Kamla*, these cases caused little concern as they were mainly in dicta or contrasting general contractors with other parties, such as jobsite owners. Unfortunately, in 2016 L&I's enforcement branch, DOSH, began relying on this strained interpretation of *Kamla* and misapplied it, leading to increasing fines for general contractors whose sole mistake was hiring a subcontractor who committed a WISHA violation.

4. <u>L&I applies per se or strict liability in enforcement of citations against general contractors</u>

Recently, DOSH has exploited the post-*Kamla* confusion in case law by updating Department policy and directives instructing Department employees on issuing citations. Although the Department claims that the changes were necessary to conform to case law, the changes themselves show that DOSH does not understand the current case law correctly, but holds general contractors strictly liable for the violations committed by subcontractors.

Beginning in 2016, DOSH updated Washington Regional Directive 27.00, which outlines the process for citing upper-tier contractors under *Stute*. In an email explaining the policy changes, Statewide Compliance Manager, Bruce Christian, said that "[t]he main change with that revision was to remove language allowing for subcontractor misconduct which went against the courts' concept of "per se" liability and to extend the rule to include an upper tier subcontractor as well as the general contractor." *See* Appendix A, Email from Bruce Christian dated June 8, 2018.

A later revision occurred in August 2018, when DOSH again updated 27.00. This time, the change directed inspectors to cite a general contractor with all violations found on a jobsite, as if they were the only employer on the site.[2] In announcing this update in an explanatory email

[2] By so doing, citations now bypass the law established around WAC 296-155-100(1), in which general contractors had a defense like unavoidable employee misconduct. This removes all factual defenses for general contractors and allows L&I to recover from both the sub and prime contractor for the same violation.

Bruce Christian made it clear that it was the intent of the department to treat the general contractor as liable, per se. Appendix A.

Despite these assertions, L&I's position that general contractors are per se liable for the safety violations of subcontractors is unsupported by statute, by this Court's holdings, and is constitutionally suspect. It allows L&I to act as judge, jury, and executioner with little recourse for the accused party to assert defenses in any meaningful venue. At a minimum, such a position implicates procedural and substantive due process rights of general contractors, as well as the excessive fines provisions of the state and federal constitutions.[3]

C. APPLYING STRICT LIABILITY TO GENERAL CONTRACTORS UNDERMINES THE STATUTORY SYSTEM OF INDUSTRIAL INSURANCE

Petitioner and L&I's view that general contractors not cited for safety violations should still be vicariously liable in tort for the actions of subcontractors conflicts with the letter and spirit of Washington's Industrial Insurance Act. The Act is the exclusive remedy for a worker injured while in the course of employment. RCW 51.04.010. Any worker who is injured while in the course of employment and makes timely

[3] An analysis of how strict liability in this context violates the state and federal constitutions is beyond the scope of this brief and should be unnecessary since these issues are not ripe on an interlocutory appeal. However, if requested by the Court, Amicus BIAW is prepared to provide a supplemental brief on this topic.

application to L&I is entitled to workers' compensation benefits. RCW 51.28.030. A state fund was established as the source for recovery.

The purpose of the industrial insurance act is to make certain an employee's relief and to provide for recovery regardless of fault or due care on the part of either the employee or employer. *Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 519 P.2d 22 (1974). All employers must contribute to this fund (except for self-insurers), and in return they are granted immunity from tort actions by an employee. RCW 51.04.010; RCW 51.08.175. The act does provide for an exception when the worker's injury is because of the negligence of a third party (defined as one not in the worker's same employ). The worker, or beneficiary, may elect to sue that third party for damages. RCW 51.24.030. Electing to pursue the third party does not preclude the beneficiary from receiving benefits. RCW 51.24.040. Yet the Department is entitled to reimbursement of benefits paid if the third-party recovery exceeds these benefits, and the act also provides a lien to enforce the reimbursement right. RCW 51.24.060.

Here, L&I's application of what is in essence a doctrine of strict liability to general contractors runs counter to the strong immunity protections inherent within the legislative scheme of industrial insurance. Put another way, industrial insurance would have little value to employers if privity with an immune party made them automatically liable for

another employer's safety violation and therefore on the hook for the cost of the covered injury.

Yet this is precisely what L&I advocates: to hold a general contractor strictly liable for the safety violations of the subcontractors, as well vicariously liable for those same violations in a suit in tort- even though the subcontractor enjoys immunity in tort for those same violations. Such a position ignores the balance between business and labor contemplated by the Industrial Insurance Act and constitutes a chance to circumvent its protections. L&I argues that "Inland's position undermines the safety of workers in Washington" Washington." Brief of Amicus Curiae Department of Labor and Industries, pg. 9. On the contrary, L&I's position undermines work safety because subcontractors have little incentive to maintain a safe work place if they know that general contractor can be held liable for the same violations causing a worker injury for which they enjoy immunity.

V. CONCLUSION

This Court should limit its review to the narrow issue presented by the ruling currently on appeal: the application of RAP 2.3 to this case. If the Court does consider the merits of the underlying issue, contractor liability, the Court should remain consistent with its reasoning in *Afoa II.* The liability of general contractors for safety violations and in tort, while

substantial, is and should remain limited to instances in which the facts prove that general contractor actually breached her duty.

Respectfully submitted this 3rd day of May, 2019,

By: _____

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Appendix A

From: Christian, Bruce (LNI)
Sent: Friday, June 8, 2018 12:20 PM
To: LNI DL DOSH
Cc: Furst, Elliott (ATG); Kortokrax, Sarah (ATG); Thomure, Pam (ATG)
Subject: Stute changes

Back in November, 2016, DOSH Directive 27.00 was updated to reflect on-going refinement of the court cases regarding the *Stute* decision. The main change with that revision was to remove language allowing for sub-contractor misconduct which went against the courts' concept of "per se" liability and to extend the rule to include an upper-tier subcontractor as well as the general contractor. What wasn't changed when the directive was updated is how *Stute* is cited. Currently, the direction is to use WAC 296-155-100 (1)(a) under management's responsibility stating that it is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice a safe and healthful working environment. As the law in this area has evolved, it is time for how we cite under *Stute* to evolve as well.

Beginning immediately, WAC 296-155-100 (1)(a) will no longer be used in order to cite a *Stute* violation. You will now use the direct code that the subcontractor is being cited for to cite the general and/or upper-tier subcontractor. Therefore, if you are citing a sub-contractor WAC 296-155-24609(7)(b) for not using an appropriate fall protection system while exposed to fall hazards of four feet or more to the ground while working on a walking/working surface, then you will cite the general and/or upper-tier subcontractor using the same code of WAC 296-155-24609 (7)(b).

When there are similar hazards on a worksite such as fall issues from a roof, scaffold, and a ladder these will be grouped violations. For those "astute" viewers out there, you will be saying to yourself, "But wait, this goes against the current grouping policy per the compliance manual. I can't bring myself to do that!". Never fear, for the compliance manual is being updated to include *Stute* as a reason to group violations. I see in your near future an email about the draft compliance manual remodel being available.

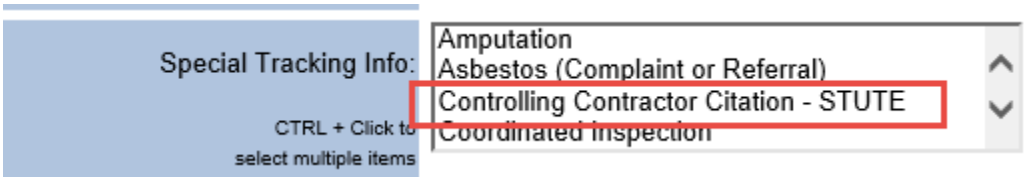
Example: You arrive on a jobsite and observe subcontractor A with employees on a 20 foot roof with no fall protection, subcontractor B with employees on a 20 foot scaffold with no railings and an employee on a 20 foot step ladder standing on the top step, and contractor C also has employees on the 20 foot roof without fall protection. Subcontractor A will receive a serious for the fall protection issues on the roof. Subcontractor B will receive a serious violation for the scaffold railings and a serious violation for the ladder

violation. Subcontractor C will also receive a serious violation for the fall protection issues on the roof. The general contractor will receive a grouped violation using the same codes as the subcontractors in the following manner. Violation 1-1a will cite the fall protection issues on the roof with an instance for subcontractor A and an instance for subcontractor C. Violation 1-1b will be a violation for subcontractor B with employees on the scaffold. Violation 1-1c will be a violation for subcontractor B with an employee misusing the ladder. Only the mechanics of the actual way *Stute* will be cited are changing, going away from 155-100 (1)(a) to using the same code as the subcontractor and grouping violations, but not the spirit of how *Stute* is applied as to when to cite it and for what hazards.

Since we will no longer be using the AVD language under 155-100 (1)(a) for the *Stute* violation, you will need to use the below language for all *Stute* violations. This means you will cut and paste this language into each of the *Stute* violations and grouped *Stute* violations:

> As the general or upper-tier contractor, you did not fulfill your non-delegable duty to ensure compliance with all applicable WISHA regulations for every employee on the jobsite by assuring compliance with WAC –(insert same code used with the lower-tier employer)-- by –(insert name of employer with creating/exposing the hazard)-- by --(insert same AVD language used with the non-general contractor/upper-tier employer also being cited)- -.

Since we will no longer be able to track *Stute* violations by searching for 155-100 (1)(a), it is very important to use the Special Tracking Information box and selecting the following updated option:



The update now includes " – STUTE" in the description to make it very clear. I know all of you understood what a "Controlling Contractor Citation" was, but this change makes it that more clearer.

DOSH Directive 27.00 is planned to be updated and published early July which means this email is the interim policy guidance for citing *Stute*. You will still follow DOSH Directive 27.00 except for the parts superseded by this email. If

you have questions regarding this policy, please contact Rick Nadolny or Terry Walley for assistance.

Thank you.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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